

Two Models of “Absence of Movement” in Criminal Jurisprudence

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INTRODUCTION

The distinction between act and omission is deeply embedded in our legal thinking. In criminal jurisprudence, there is significant difference between an act that causes harm and an omission that causes harm. In order to convict someone of committing an act that caused harm, any voluntary act will suffice—assuming the existence of other elements of the crime, such as causation and intent. On the other hand, a conviction based on an omission that caused harm requires that the person convicted had a duty to act such that a breach of that duty caused the harm. This stance is reflected in the Model Penal Code, which states explicitly in Section 2.01(3)(b) that it is possible to commit a crime by omission only if there exists a duty to act under the law.¹

The generally accepted approach in criminal jurisprudence is that the definition of act and omission is subject to the test of bodily movement. This essay critiques this position and points to the fact that American jurisprudence is not uniform with regard to the definition of act and omission in the criminal-law context. The essay suggests that this lack of uniformity springs from the differing rationales that underpin the distinction between act and omission in criminal jurisprudence.

This essay goes on to discuss an alternate way to define act and omission—the test of risk creation. Under this test, there are instances that involve bodily movement that should be classified legally as omissions. More significantly, there are instances that do not involve any bodily movement that should be classified as acts.

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¹ MODEL PENAL CODE § 2.01(3) (1962). See also RICHARD CARD, CARD, CROSS & JONES, *CRIMINAL LAW* 37 (20th ed. 2012); DAVID ORMEROD, SMITH AND HOGAN'S *CRIMINAL LAW* 70–75 (13th ed. 2011).

In direct correlation to this test, this essay presents two models for absence of movement: enabling absence of movement and risk-creating absence of movement. It concludes that an absence of movement of the second type is an act in the legal sense rather than an omission. Consequently, instances included in the second model will not require identification of a duty to act in order to convict a defendant. This is a new distinction in criminal jurisprudence that has not previously been articulated.

Section I sets forth the bodily movement test for defining act and omission along with the theories of causation and freedom that support this test. Section II critiques this test. Section III briefly demonstrates that American courts are not uniform in treating the definition of act and omission in the criminal context. The final section presents an alternate legal-philosophical analysis under which the definition of act and omission is not subject to the bodily movement test but rather to the risk creation test. It argues that bodily movement in and of itself has no moral significance in terms of the responsibility and guilt of the actor. This section concludes that it is not appropriate to treat equally all situations in which a defendant did not move his body, but rather we should distinguish between enabling absence of movement and risk-creating absence of movement.

I. THE BODILY MOVEMENT TEST AND ITS UNDERLYING RATIONALES

As mentioned above, there are serious implications as to whether an act or an omission causes harm, since conviction for an omission, as opposed to an act, requires identifying a duty to act on the part of the accused.

One widespread approach in criminal jurisprudence is to define the concepts of act and omission under a bodily movement test. That is, an act assumes some movement of muscles, while omission assumes the absence of such movement. When A shoots B and kills him, this constitutes killing by an act since A moved his muscles in order to kill B. However, when A sees B drowning and does not save him, this is an omission because A did nothing to cause the death of B. In this case, A will be convicted only if he had a duty to act.

In order to understand why it is appropriate to subject the definition of act and omission to the bodily movement test, we need to step back for a moment and ask: What is the rationale for this distinction between act and omission in criminal jurisprudence—why will any act suffice in order to convict someone of an act that caused harm (assuming the requisite causation and intent), while we will convict someone for an omission that caused harm only if the accused had a duty to act?² Why should we not convict someone so long as the person could have prevented

² The question of the purpose of the rationale that distinguishes between act and omission in criminal jurisprudence is discussed with respect to situations where all other conditions are equal: the results in both situations are identical, the intent is identical, and the expenses of preventing death are identical.

the harm and failed to do so? This question is not simple, and many legal philosophers and jurists have pondered it.³

Two legal theories suggest justifications for the distinction between act and omission in criminal jurisprudence and support the bodily movement test.

A. Causation

It is possible to define act and omission as they are used in natural speech. Moore states:

Omissions are simply absent actions. An omission to save life is not some kind of ghostly act of saving life, and certainly not some ghostly kind of killing. It is literally nothing at all. . . . [A]ctions are event-particulars of a certain kind, namely, willed bodily movements. Anticipating the results of that analysis, we can then say that omissions are the absence of any willed bodily movements.⁴

Therefore, he claims, in the context of mercy killing, when a physician unplugs a patient from life support, he causes the death of the patient by an act, not merely by omission, as some jurists and philosophers who discuss this issue maintain. According to Moore, since unplugging the machine is a bodily

³ For writers who deal with this issue from the legal perspective, see JOEL FEINBERG, *HARM TO OTHERS* 159–81 (1984); GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 59–70 (1998); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 593–602 (1978); [hereinafter FLETCHER, *RETHINKING CRIMINAL LAW*]; MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 25–60 (1993) [hereinafter MOORE, *ACT AND CRIME*]; George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443 (1994); F.M. Kamm, *Action, Omission, and the Stringency of Duties*, 142 U. PA. L. REV. 1493 (1994); Leo Katz, *Proximate Cause in Michael Moore's Act and Crime*, 142 U. PA. L. REV. 1513 (1994); Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547 (1988); Michael S. Moore, *More on Act and Crime*, 142 U. PA. L. REV. 1749 (1994).

For writers who dealt with this issue from an ethical perspective, see O.H. Green, *Killing and Letting Die*, 17 AM. PHIL. Q. 195 (1980); Philippa Foot, *Killing and Letting Die*, in *KILLING AND LETTING DIE* 280 (Bonnie Steinbock & Alastair Norcross eds., 2d ed. 1994); Jeff McMahan, *Killing, Letting Die, and Withdrawing Aid*, in *KILLING AND LETTING DIE*, *supra*, at 383; P.J. Fitzgerald, *Acting and Refraining*, 27 ANALYSIS 133 (1967); Tracy L. Isaacs, *Moral Theory and Action Theory*, *Killing and Letting Die*, 32 AM. PHIL. Q. 355 (1995); Jonathan Bennett, *Whatever the Consequences*, in *KILLING AND LETTING DIE*, *supra*, at 167; Bruce Russell, *Presumption, Intrinsic Relevance, and Equivalence*, 4 J. MED. PHIL. 263 (1979); James Rachels, *Killing and Starving to Death*, 54 PHIL. 159 (1979); James Rachels, *Active and Passive Euthanasia*, in *KILLING AND LETTING DIE*, *supra*, at 112; John Harris, *The Marxist Conception of Violence*, 3 PHIL. & PUB. AFF. 192 (1974); SHELLEY KAGAN, *THE LIMITS OF MORALITY* 83–127 (Derek Parfit ed., 1989); Michael Tooley, *An Irrelevant Consideration: Killing Versus Letting Die*, in *KILLING AND LETTING DIE*, *supra*, at 103.

⁴ MOORE, *ACT AND CRIME*, *supra* note 3, at 28.

movement, such unplugging cannot be equated with merely not connecting the patient to life support in the first place.⁵

Moore's position, which defines act and omission in accordance with the bodily movement test, is based on the rationale that he suggests for the distinction between act and omission in criminal jurisprudence: an act that causes harm worsens the situation of the victim, while an omission does not improve the victim's situation but also does not worsen it. This rationale is rooted in a causal analysis that maintains that only movement can cause change in the world and only such change can cause harm. In contrast, absence of movement cannot create change in the world and therefore cannot cause harm.⁶

According to Moore, the reason for the need to identify a duty to act in a situation of omission flows naturally from the causal analysis underpinning the distinction between act and omission. With regard to an act that involves bodily movement, there is a causal relationship between the act and the respective harm, while with regard to omission—that is, absence of bodily movement—there is no such causal connection between the omission and the harm. Thus, there is the need to identify a breach of a duty to act. In other words, the breach of a duty to act constitutes a substitute for the existence of a physical causal connection.⁷ Moore admits that in order to convict someone of murder there must be proof of the existence of a factual causal connection. However, he claims that with regard to an omission, there is no physical causal connection but rather a causal explanation: if the person had fulfilled his duty then the death would not have occurred.⁸

B. Liberty

Under the liberty rationale, the distinction between act and omission in criminal jurisprudence follows from the fact that prohibiting acts that cause harm does not significantly infringe upon the liberty of action of citizens since all that is required is to refrain from specified acts. However, prohibiting omissions that cause harm does significantly infringe upon the citizen's liberty since such a prohibition would require that at any given moment the citizen must stop what he is doing to prevent harm to another. Consequently, if it were possible to convict someone of a crime (particularly a result crime) for causing it by omission where there was no specific duty to act, we would need to abandon all endeavors and be ready to act at any time. The legal system must permit people to lead their normal lives in a reasonable manner without constantly having to abandon everyday pursuits and embark upon rescue missions.⁹

⁵ *Id.* at 26–27.

⁶ *Id.* at 25, 28–29.

⁷ Moore, *More on Act and Crime*, *supra* note 3, at 1784–85.

⁸ *Id.*

⁹ A.P. SIMESTER & G.R. SULLIVAN, CRIMINAL LAW: THEORY AND DOCTRINE 61–70 (2000). For a similar position, see Itzhak Kugler, *Derishot Hahova Lif'ol Bedinei Hamehdal Haplili*:

The requirement that there be a duty to act in the case of omission serves, therefore, to limit the number of cases in which a citizen must act in order to prevent harm. Thus, it limits the infringement on liberty and permits a person to live a normal life.

Under this analysis as well, the accepted test for defining act and omission for the purposes of identifying the duty to act is the bodily movement test.¹⁰ The prohibition of an act defined as bodily movement does not unduly infringe upon a person's liberty since alternative spheres of action are still open to him. On the other hand, a prohibition of an omission—the absence of movement—does infringe upon a person's liberty since such prohibition requires a person to perform certain acts. Were this to happen frequently, a person would not be able to conduct his life in a reasonable manner. If one had a general duty to prevent all harm, any time he became aware of some harm about to happen, a person would have to use his muscles in a way that would prevent the harm. Since a person cannot be in two places at once, and since a person cannot perform a limitless number of actions with his muscles at once, almost every time he would be forced to abandon his usual pursuits. Were this requirement to mobilize to occur frequently, there would be significant interruption to all normal life. On the other hand, when the prohibition is on causing certain results by using one's muscles to act, the situation is very different. Every time one has a chance of causing a prohibited result by using one's muscles, the disruption is not significant because a person has many other spheres of activity available.¹¹

Hatzdakat Hadrisha, Heikef Haluta Veba'igun Haformali Shel Hahovot Lif'ol, 20 MEHKAREI MISHPAT 201, 212 (2003). An additional consideration is sometimes raised in the framework of the liberty theory that differs somewhat from that stated in the text. Some claim that criminal jurisprudence is hesitant to legislate crimes of omission since these limit the liberty of the individual more than crimes prohibiting specific actions. The claim is that prohibiting an omission allows the citizen to engage in one act but prevents him from doing many others. On the other hand, prohibiting an act forbids one act but permits a wide variety of other acts. This claim has been the subject of criticism. It is not accurate to state that crimes of omission infringe upon liberty more than crimes prohibiting acts do. The question with respect to infringing upon liberty is: against whom is the crime directed and what are the desires of that person? For example, prohibiting smoking does not harm a person who does not wish to smoke, but it does infringe significantly upon the liberty of one who smokes regularly. The fact that he can sing or dance rather than smoke does not prevent or even mitigate the infringement. See Fletcher, *supra* note 3, at 1450–51. The consideration presented in the text is slightly different. The claim does assume that when an act is prohibited, a citizen retains the liberty to perform a variety of other acts, while when an omission is prohibited, the range of acts is limited. However, this claim adds that with regard to result crimes (usually without any defined behavior) the need to act is a regular need that occurs constantly and therefore it would be a significant infringement upon liberty.

¹⁰ Kugler, *supra* note 9, at 226–32.

¹¹ *Id.* at 233–34.

II. CRITIQUE OF BODILY MOVEMENT TEST

Several scenarios illustrate problems with using the bodily movement test to define act and omission in criminal jurisprudence:

1. **Dodging the Bullet**—A shoots at B, who is in an armored vehicle. B, who is aware of C's presence on the scene, moves the vehicle, and the bullet strikes C, killing him.
2. **Death by Exposure**—B is dying of exposure. In order to save himself, he attempts to enter A's home. A locks the door. As a result, B dies.
3. **Standing Still**—B is about to collide with A. If A stands still, B will die. If A moves, B will be saved. A stands still, and B dies as a result of colliding with A.
4. **Silent Encouragement**—A has significant influence over B. B plans to kill C but wishes to consult with A first. B brings C to A's office at gunpoint. B aims the gun at C and tells A explicitly that he intends to kill C. A can prevent the murder by telling B to stop. A knows that if he says nothing, B will take this as encouragement to proceed. A says nothing, and B kills C.
5. **Silent Threat**—A and B are sitting together near C. B threatens C by saying that A intends to harm C's family. A, a known criminal, is aware that C will take such a threat seriously. A remains silent but continues to sit next to B and C.
6. **Silent Treatment**—A's classmates decide to stop speaking to him. As a result, A suffers harm.

The first two scenarios involve bodily movement and even meet the requirements of but-for causation. In the first scenario, B moves, and as a result, C dies. In the second scenario, A locks the door, and as a result B dies. Under the bodily movement test, both scenarios would be classified as a killing by an act since there is bodily movement that has a causal connection to the death of the victim. Under this test, therefore, there is no need to identify a duty to act in order to convict. Nonetheless, it would be more appropriate to classify these scenarios as death by omission (letting die) rather than death by action. Thus, in the first case it is only appropriate to convict B of murder or manslaughter (depending on B's mens rea) if he had a duty to remain in place. Similarly, in the second scenario, it is appropriate to convict A of murder only if he had a duty to leave the door unlocked. If, indeed, these scenarios should be classified as omissions, then the bodily movement test is faulty.¹²

¹² These scenarios differ from others in which a person performs an act simultaneous to the omission but the act has no influence on the result. For example, when A sees B drowning and fails to save him, A may be drinking, singing, whistling, or dancing while not saving B, but this is still

So far we have discussed situations that involve bodily movement but should be classified legally as omissions. The opposite is also true.

The third scenario does not involve bodily movement, since A decides to stand still, but there does not appear to be a need to find a duty to act in order to convict A of manslaughter (assuming intent) even though A does not move his muscles. The fourth scenario also does not involve bodily movement, since A does nothing but simply remains silent. However, in this case, A's silence (assuming intent) is what encourages B to murder C. In such a case, it is hard to see a difference in severity of behavior and responsibility between verbal encouragement and encouragement via silence.

In the fifth scenario, A is aware that his presence and silence close to C threatens C. In this case as well, it is hard to see a significant difference between a threat expressed in words and that expressed by A's silence. In this case, there would be no requirement of a duty to act in order to convict A.

In the sixth scenario, the silence of A's classmates is what causes him harm. In this case, if we were dealing with a crime (which, admittedly, we are not) there would not be a need to identify a duty to act in order to convict.

These six scenarios undermine our belief in the bodily movement test as the optimal method of defining act and omission in criminal jurisprudence.

III. UNITED STATES COURT DECISIONS REGARDING ABSENCE OF ACTION

U.S. case law is not uniform with regard to the question of whether the absence of bodily movement will always be considered an omission. A number of cases addressing the question of whether a person can be convicted of aiding and abetting simply because he was present when a crime was committed (with the intent to encourage the crime) shed some light on our topic. A survey of these decisions must proceed with caution, since in some cases courts have convicted based upon the act of arriving at a place where a crime is being committed in order to aid and abet. Other courts have convicted because the defendant's presence at the crime scene proves that he was an active participant at some time prior to the culminating act. If so, in the final analysis, he is convicted for an act and not for his mere presence. The presence simply provides evidence that there was an earlier act.

Some courts do indeed require the identification of a duty to act in order to convict where the defendant was merely present, thus indicating that they define act and omission in accordance with the bodily movement test. In *Pace v. State*,¹³

classified as omission in the legal context (requiring a duty to act in order to convict) since these actions are not related to the result. That is, such actions do not contribute at all to the result of drowning. On the other hand, in the scenarios presented above, C's action in the first scenario and A's action in the second do, apparently, have a connection to the result, since had they not moved, no one would have died. See also MOORE, ACT AND CRIME, *supra* note 3, at 24–31.

¹³ 224 N.E.2d 312 (1967).

the defendant was driving a car, and his friend was one of the passengers. At some point, they picked up a hitchhiker. Subsequently, the friend pulled out a knife and robbed the hitchhiker. The defendant said and did nothing the entire trip. He was tried for aiding and abetting robbery. The court found him not guilty:

The main question presented in the facts at bar is what evidence beyond the mere presence of a person at the scene of a crime is sufficient to sustain a connection as an accessory before the fact? This court has previously stated that negative acquiescence is not enough to constitute a person guilty of aiding and abetting the commission of a crime. Consequently, this court has always looked for affirmative conduct either in the form of acts or words from which reasonable inferences of a common design or purpose to effect the commission of a crime might be drawn.¹⁴

Similarly, in *State v. Walden*,¹⁵ a woman was tried for aiding and abetting serious injury in that she failed to prevent the father of her one-year-old child from beating the child with a belt. The mother argued that she could not be found guilty of aiding and abetting since she did nothing. The court held that had she had no duty to prevent the crime and that she could not have been convicted in light of the fact that she performed no act. However, in this case, such a duty did exist, and she could be convicted for her omission.¹⁶ Apparently, in this court's view, had there been no duty on her part to prevent the father from beating the son, she could not have been convicted even though her silence encouraged him to commit the crime. Thus, the court supported, in principle, the bodily movement test as the appropriate method to distinguish between act and omission.

We think that the rule we announce today is compelled by our statutes and prior cases establishing the duty of parents to provide for the safety and welfare of their children. Further, we find our holding today to be consistent with our prior cases regarding the law of aiding and abetting. It remains the law that one may not be found to be an aider and abettor, and thus guilty as a principal, solely because he is present when a crime is committed. It will still be necessary, in order to have that effect, that it be shown that the defendant said or did something showing his consent to the criminal purpose and contribution to its execution. But we hold that the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the

¹⁴ *Id.* at 312-13 (citations omitted).

¹⁵ 293 S.E.2d 780, 782-83 (1982).

¹⁶ *Id.* at 785.

parent's consent and contribution to the crime being committed. (citation omitted).¹⁷

However, other courts have convicted without identifying such a duty. In such cases, the rationale to convict was that the presence in and of itself encouraged the primary actor to commit the crime.

In *State v. Goodwin*,¹⁸ the defendant was traveling with someone named Taylor in the defendant's car. At a certain point, Taylor kidnapped a young woman and forced her into the car. During the trip, the defendant, drinking beer, sat next to the driver. The three traveled to the defendant's apartment, where Taylor raped the girl, and the defendant did nothing. The defendant was convicted of aiding and abetting the kidnap and rape. During his trial, the defense argued that he could not be convicted since he did nothing and had no duty to prevent the crime. The court stated:

Mere presence at the scene of a crime is insufficient to make a person criminally responsible. Nevertheless, presence can be enough to prove complicity if the presence is intended to, and does, aid the primary actor. "*Presence is thus equated to aiding and abetting when it is shown that it designedly encourages the perpetrator, [or] facilitates the unlawful deed*" Moreover, "the circumstances under which the defendant is present . . . may be such as to warrant the jury inferring beyond a reasonable doubt that he sought thereby to make the crime succeed" ¹⁹

A similar issue arose in *State v. Hargett*.²⁰ There, the defendant was accused of aiding and abetting manslaughter. The victim was found in a ditch and had died of drowning. The defendant said that his friend threw the victim in the ditch while he simply stood by and did nothing; therefore, he should not be convicted of aiding and abetting since he had no duty to prevent the death. The court found the defendant not guilty but added:

The evidence does not warrant a verdict of guilty on the ground of aiding and abetting. . . . Mere presence, even with the intention of assisting in the commission of a crime, cannot be said to have incited, encouraged or aided the perpetration thereof, unless the intention to assist was in some way communicated to him (the perpetrator) However, there is an exception." . . . when the bystander is a friend of the

¹⁷ *Id.* at 786–87.

¹⁸ 395 A.2d 1234 (1978).

¹⁹ *Id.* at 1236 (emphasis added) (citations omitted).

²⁰ 121 S.E.2d 589 (1961).

perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement, and in contemplation of law this was aiding and abetting.”²¹

Finally, in *State v. Parker*,²² the victim met with three men who demanded that he transport them in his car to a party. At some point, the three began to beat him repeatedly. They also broke a beer bottle over his head. Even after the victim feigned unconsciousness, they continued to beat him over his entire body until they thought he was dead. At some point, they loosened their grip, and when the car slowed, the victim was able to escape. Parker denied taking part in the attack and claimed that he simply sat in the car but did nothing. The court stated:

It has been established that a person may aid or abet without actively participating in the overt act. If the proof shows that a person is present at the commission of a crime without disapproving or opposing it, it is competent for the jury to consider this conduct in connection with other circumstances and thereby reach the conclusion that he assented to the commission of the crime, lent to it his approval, and was thereby aiding and abetting its commission. *Certainly mere presence on the part of each would be enough if it is intended to and does aid the primary actors.*²³

This decision indicates that at times no overt act can be considered an act in the legal sense such that there is no requirement to identify a duty to act.

Thus, there are situations in which absence of bodily movement will be considered an act in legal terms rather than an omission. In such cases, it is possible to convict someone without identifying a duty to act. The reason is that the mere presence in and of itself aids and encourages the primary actor to commit the crime.

What is the point of dispute between those decisions that subjected the definition of act and omission to the bodily movement test (*Pace*, *Walden*) and those that did not (*Goodwin*, *Hargett*, *Parker*)? Apparently, those courts that define act and omission in accordance with the bodily movement test subscribe to the causation and/or liberty rationales discussed above. On the other hand, those courts that do not define act and omission strictly in accordance with the bodily movement test appear to subscribe to a different rationale, the creation of risk rationale presented below, for the distinction between act and omission in criminal jurisprudence.

²¹ *Id.* at 592.

²² 164 N.W.2d 633 (1969).

²³ *Id.* at 641 (emphasis added).

IV. PROPOSED LEGAL-PHILOSOPHICAL APPROACH WHICH SEVERS THE DEFINITION OF ACT AND OMISSION FROM THE BODILY MOVEMENT TEST

A. Conduct as Enabling or Creating the Threat or Risk that Led to Harm

Section I discussed two rationales for distinguishing between act and omission in criminal jurisprudence that support the bodily movement test as the appropriate method of classifying act and omission in criminal jurisprudence. There is, however, an alternate rationale for this distinction.

Under this rationale, the distinction between act and omission flows from a different causal relationship than that expressed by Moore. The distinction between act and omission is embedded in the difference between conduct that creates a risk that leads to harm and conduct that merely enables a preexisting risk to become actualized. The idea is that conduct that creates a risk involves greater responsibility and fault on the part of the actor than does conduct that merely enables a risk to become actualized.

Under this approach, when someone creates a risk that causes harm, that is an act, while when the actor did not create the risk but only allowed it to become actualized, that is an omission. In order to determine who created the risk that led to a particular harm, it is necessary to go through two stages. First we identify the cause of the harm, and second we clarify who created the risk that caused the harm.²⁴ Thus, when A shoots B and B dies, we first conclude that B died as a result of being shot, and we then go on to identify A as the one who initiated the shot hitting B. That is, we classify A's conduct as an act from the legal perspective not because A moved his finger and shot B, but because A created the risk that led to B's death. On the other hand, in the usual case where A sees B drowning and does not save him, we characterize A's conduct as an omission, not because he did not move his muscles, but because we do not see A as the one who created the risk of B's death. In this case, we argue that the waves caused his death.

In contrast with Moore's approach, the risk-creation rationale means that certain instances that involve bodily movement should nonetheless be considered omissions, since the actor did not create the risk but merely allowed it to be actualized. More to the point, there are situations that do not involve bodily movement that should be considered legally as acts rather than omissions. Reliance on this rationale enables us to more accurately classify the scenarios presented above in the critique of the causation and liberty rationales.

Under this new analysis, the "Dodging the Bullet" scenario is classified legally as an omission even though B moves his muscles and C dies pursuant to that movement. In this scenario, we do not see B as the creator of the risk; A is because A shoots the bullet, creating the primary threat that leads to death. B's

²⁴ See Foot, *supra* note 3, at 281–82.

movement merely allows the risk that A created to be actualized.²⁵ The "Death by Exposure" scenario is another example. A's locking the door does not create a risk but merely allows the threat of harm created by the outside conditions to become actualized.²⁶

²⁵ See also McMahan, *supra* note 3, at 389–90 (regarding the distinction between killing and letting die). According to McMahan, the distinction relies on the question of whether the actor created the threat or only allowed the threat to become actualized. McMahan presents two scenarios to prove this claim: In Dutch Boy 1, a Dutch boy sees a dike that is beginning to break, threatening to flood the town and kill all of its inhabitants. The boy plugs the hole with his finger and prevents the dike from breaking. After several hours the boy tires and returns home. As a result, the dike bursts and the town's residents perish. In Dutch Boy 2, a Dutch boy sees a dike that is beginning to break, threatening to flood the town and kill all of its inhabitants. The boy plugs the hole with his finger and prevents the dike from breaking. After several hours, the boy's father comes and takes him home. As a result, the dike bursts and the town's residents perish.

McMahan classifies Dutch Boy 1 as letting die but Dutch Boy 2 as killing rather than letting die. The reason for this distinction is that in Dutch Boy 1, the child's removal of his finger does not create a new threat since the identity of the one removing the defense against the natural threat is the same as the one who placed the defense in the first place. In this instance, removing the finger simply returns the situation to what it would have been had the boy not interfered at all. On the other hand, however, in Dutch Boy 2 the removal of the finger by the father is a creation of a new threat, since the identity of the one who removed the defense is not the same as the one who placed the defense. In this situation, had the father not interfered, the townspeople would have been saved by the son. Therefore, the father's interference is considered the creation of a primary threat that causes the townspeople's death. See *id.*

Note that according to McMahan, the classification is not related to the intent of the person (that is, in Dutch Boy 1, it is "letting die" since the boy was tired, while Dutch Boy 2 is "actual killing" since the boy was prepared to continue and the father had no justification for stopping the son's action); rather, the classification is neutral and not related to moral judgment of these two scenarios.

²⁶ The question of when the actor created the harm and when he merely allowed a threat to become actualized is not a simple one. Thus, one could posit a slightly different version of "dodging the bullet" vs. "shielding against the bullet" such that B does not merely move aside but grabs C and uses him as a shield against the bullet shot by A. In this case it seems clear that from a legal perspective we consider this to be active killing, not passive letting die (irrespective of any legal defenses B could raise). However, why would we not say that B simply allowed the threat initiated by A to become actualized? The answer is that in shielding, B created a new threat and did not simply allow A's earlier threat to become actualized. We can illustrate this via the question: What would have happened had B not existed? Had B not existed, C may still have died from A's bullet, but he would have died in a different way (the bullet would have had to travel a different path, would have struck C differently, at a different time, etc.). Thus, we conclude that B's act created a new threat, and did not merely allow an earlier threat to be actualized.

Another, even more problematic, example is "Moving Aside." In this scenario, B did not dodge; rather D moved B so that the bullet would strike C. This case, too, should be classified as active killing by D rather than omission. However, the only difference is that in "Dodging the Bullet" B moved himself aside and in "Moving Aside" D moved B. As such, why should there be a difference in terms of responsibility and guilt between B in "Dodging the Bullet" and D in "Moving Aside?" Again, one can argue that in "Moving Aside" D created a new threat to C that did not already exist, while in "Dodging the Bullet" there is no such new threat created. That is, in "Moving Aside," had D not existed, C would not have died. Therefore, D's act created a new threat. On the other hand, in "Dodging the Bullet," had B not existed, C would have died in exactly the same manner that he did die when B dodged; thus we do not consider this the creation of a new threat.

Notwithstanding the above, it is possible to claim that only an act that involves bodily movement can create a risk, while the absence of bodily movement cannot create risk. As such, absence of bodily movement will always be considered an omission and not an act. This claim is flawed, however, since even conduct that is not accompanied by bodily movement, such as silence or standing still, can create risk.

The risk-creation approach has many supporters in the realm of philosophy of science and ethics. For example, Donald Davidson maintains that just like there is a causal connection between two events when the first event is the cause and the second is the result, there exists a causal connection between a mental act of a person and his physical external act.²⁷ When A shoots B, there is certainly a causal connection between the mental act—the decision to shoot B—and the actual shooting. The decision to shoot B is the cause of shooting B. Mental acts that are causes of results are events in every way, and there are a wide range of such actions, such as: deciding to perform an action, consideration, judgment, etc.²⁸

Therefore, when A shoots B and B dies, there are two causal connections: the first is between the intent, or decision, to shoot B and shooting B, and the second is between the shooting of B and his death. Apparently, according to Davidson, just like there is a cause and effect relationship between the act of shooting and the death of B, there may be a cause and effect relationship between the deliberate silence of a person and the harm caused as a result from this silence. If we consider, for example, the "Silent Treatment" scenario, it is possible to say, according to Davidson, that the silence of the class that followed the deliberate decision (mental act) created the harm caused to B. That is, in the final analysis, according to Davidson, the mental act that was expressed in the decision to be silent created the harm suffered by B. In this context, note that according to Davidson, deliberate omissions constitute acts, "The word 'action' does not very often occur in ordinary speech, and when it does it is usually reserved for fairly portentous occasions. *I follow a useful philosophical practice in calling anything an agent does intentionally an action, including intentional omissions.*"²⁹

Obviously, this does not mean that people should be punished for their thoughts. But under Davidson's theory, when someone suffers harm as a result of a failure to prevent it on the part of someone else, in some situations the failure to

However, not always will asking what would have happened had the actor not existed lead us to the correct answer to the question of whether there is or is not a new threat created. For example, in "Death by Exposure," one can ask what would have happened had A not existed, but it is not clear what the answer is, whether someone else would have permitted B to enter. However, in any event, this does not challenge the basic distinction between creating a threat and simply allowing a threat to be actualized.

²⁷ Donald Davidson, *Mental Events*, in *ESSAYS ON ACTION AND EVENTS* 208 (Donald Davidson ed., 2001); see also Donald Davidson, *Actions, Reason, and Causes*, in *ESSAYS ON ACTION AND EVENTS* *supra*, at 3.

²⁸ Davidson, *Mental Events*, *supra* note 27, at 208.

²⁹ Davidson, *Actions, Reason, and Causes*, *supra* note 27, at 20 n.2 (emphasis added).

prevent harm (when it is deliberate) is, in fact, the cause of the harm. That is, Davidson's theory can constitute a possible foundation to the position that even absence of movement, in some circumstances, can create a risk that leads to harm.

Even if we do not adopt Davidson's approach that deliberate omissions are acts, some have argued that omissions can cause a result since the elements of the causal connections (cause and effect) do not have to be events that occurred in the world (such as bodily movement)³⁰ but can be facts. Mellor proves the claim that facts, and not events, are the elements of causal connection by highlighting situations in which a causal connection appears to exist even though there was no event. For example, A's falling causes his death because of his fragile bones.³¹ That is, the fact that A's bones were fragile caused the result that he would die because of his fall. Since the characteristic of the bones being fragile is not an event, it is clear that facts can cause results. Mellor also relies on negative situations, which are similar to omissions. He posits that if you can say that A's fall caused his death, then it is certainly possible to say that A's not falling caused his not dying.³² Thus, according to Mellor, it is clear that omissions that do not involve bodily movement can cause harm.

Foot, who discusses specifically the ethical distinction between killing and letting die, argues that we should not emphasize the bodily movement of the actor and that even the absence of bodily movement can create a risk that leads to harm. Consequently, claims Foot, there are situations classified as letting die that involve bodily movement, but there are also situations defined as killing that do not involve bodily movement.

The first kind of allowing requires an omission, but there is no other general correlation between omission and allowing, commission and bringing about or doing. An actor who fails to turn up for a performance

³⁰ It should be noted that the definition of "event" was the source of confusion with regard to causation. The definition of event that appears most reasonable is that of D.H. Mellor. In his view, an event is something that occurs at a specific time and place, such that the occurrence can be pinpointed in terms of its location in both space and time. That is, an event requires a specific occurrence (that, by nature, is continuing) in time and space; in other words, an event requires change in the state of things that exist in the world. An occurrence can be short, such as the taking of a photograph, or long, such as a battle; in any event, the occurrence requires room in time and space. In this manner an event differs, theoretically, from other objects that can be pinpointed in terms of their location in space but cannot be pinpointed in terms of their location in time. See D.H. MELLOR, *THE FACTS OF CAUSATION* 121 (1995). Regarding the claim that a causal connection exists only between two events, and therefore an omission (non-acting) cannot cause a result, see Helen Beebee, *Causing and Nothingness*, in *CAUSATION AND COUNTERFACTUALS* 291 (John David Collins, Ned Hall & L.A. Paul eds., 2004).

³¹ MELLOR, *supra* note 30, at 106–09.

³² *Id.* at 132.

will generally spoil it rather than allow it to be spoiled. I mentioned the distinction between omission and commission only to set it aside.³³

Under this risk creation analysis, the last four scenarios presented above (assuming a crime) should be classified as acts rather than omissions even though they do not involve bodily movement. In "Standing Still," A stands still and as a result B dies. That is, A's standing still created the risk of B's death and did not merely allow a threat to be actualized. Likewise, in the "Silent Encouragement" scenario, A's silence did not only allow the death threats to be actualized, his silence is what encouraged B and crystallized his decision. In this sense, there is no difference between silent and verbal encouragement.

The "Silent Threat" scenario reflects a similar phenomenon. In this case, A's silence, coupled with his sitting, still created the threat. B's words without A's sitting in silence would have had no effect. Thus, this must be viewed as an act rather than an omission. Finally, in the "Silent Treatment" scenario as well, the silence of the students did not merely allow the harm to A to become actualized but is what created that harm.

Similarly, the cases in which U.S. courts have held that even absence of bodily movement can be considered an act from a legal perspective dealt with a defendant who encouraged the main actor by his very presence, but with no movement. Since these courts subscribe to the principle that creative absence of movement is considered an act and not an omission, they did not require the identification of a duty to act in order to convict under these circumstances.

In conclusion, bodily movement in and of itself has no ethical significance in terms of responsibility and guilt from the perspective of creation of the harm³⁴ since both bodily movement and the absence of bodily movement can create risk that leads to harm. Thus, the bodily movement test is not the appropriate test to define act and omission in criminal jurisprudence.³⁵

³³ Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in KILLING AND LETTING DIE, *supra* note 3, at 273.

³⁴ It would be possible to say that even if we assume that bodily movement, in and of itself, is not significant in terms of causing harm, in the sense that even silence or standing still can cause harm, it would still be possible to say that it has significance in terms of infringement upon personal liberty. As noted above, using the bodily movement test to define act and omission is intended to maintain personal liberty. The ensuring of personal liberty is a sufficient reason to retain the bodily movement test as the method for defining act and omission. Nonetheless, even under the liberty analysis, in situations in which silence or standing still create the harm or the risk, we do not have to identify a duty to act. Therefore, in situations in which there is silent encouragement, we will not require the identification of a duty to act, since in such situations there is no infringement upon liberty.

³⁵ For a position that also negates the bodily movement test, see FLETCHER, *RETHINKING CRIMINAL LAW*, *supra* note 3, at 601–02; Fletcher, *On the Moral Irrelevance of Bodily Movements*, *supra* note 3, at 1445. Fletcher's approach sits well with his position regarding the essence of the demand for an act in criminal jurisprudence. For him, the emphasis on demanding an act must be due to the influence of a person's conduct on his social environment. Thus, he opposes the mechanistic

B. *Two Models with Respect to Absence of Bodily Movement*

In light of this new causal perspective, we can discuss two distinct models of absence of bodily movement in criminal jurisprudence.

The first model is the mere failure to prevent a risk that causes harm. This model relates to situations in which silence or standing still does not prevent the risk but does not create it either. We refer to this as enabling absence of movement. In such situations, a threat already exists, and a person does not move and thus does not prevent the risk from being actualized. The classic scenario is that of the person who does not prevent someone from drowning. In this situation, the risk of drowning exists with no relation to the potential savior, and the savior allows the risk of drowning to be actualized. This situation does not differ from the usual example of omission in which the identification of a duty to act is required in order to convict.

The second model is the creation of risk that causes harm. This model relates to situations in which the absence of bodily movement itself is what creates the risk that leads to harm. We call this creative absence of movement. In such situations, refraining from motion not only allows a risk to be actualized but in and of itself creates a risk. In such situations, the lack of movement is equal to a positive act. Consequently, we would not require identification of a duty to act in order to convict, since in terms of responsibility and guilt there is no difference between creating harm by act or creating harm by silence or holding still.

As indicated above, the scenarios: "Standing Still," "Silent Encouragement," "Silent Threat," and "Silent Treatment" illustrate this second model, creative absence of movement, as do the U.S. cases *Goodwin*, *Hargett*, and *Parker*.

CONCLUSION

This essay demonstrates that the bodily movement test is not the appropriate test to define act and omission in criminal jurisprudence. Bodily movement in and of itself has no moral significance in terms of responsibility and guilt on the part of the actor. As such, the more significant question is whether the actor's conduct created the threat that led to harm or whether such conduct (whether active or passive) merely enabled a threat to become actualized. Under this analysis, standing still or remaining silent can create a risk that causes harm. Consequently, there are situations that involve bodily movement that should be considered

approach of Moore presented above—that an act is bodily movement that follows from the will. To him, the emphasis on demanding an act is not in terms of physiological-scientific meaning of an act but in the influence that an act has on a person's social environment. GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* 283 (2007).

Commentators on Fletcher's book understood that the emphasis is on the influence that an act has on a person's social environment. See Francisco Muñoz Conde & Luis Erensto Chiesa, *The Act Requirement as a Basic Concept of Criminal Law*, 28 *CARDOZO L. REV.* 2461, 2463–64 (2007).

omissions, and, more importantly, there are situations that do not involve bodily movement that should nonetheless be considered acts from a legal perspective.

U.S. case law is not uniform with regard to the definition of act and omission in criminal jurisprudence. With respect to situations involving a mere presence at the time a crime was committed, some courts have held that such person can be convicted only if he had a duty to act since mere presence is an omission. However, other courts did indeed convict of aiding and abetting a person who was present when a crime was committed without identifying a duty to act. Judges have stated that from a legal perspective such presence constitutes an act, not an omission, where the very presence encourages the primary actor to commit the crime.

This lack of unity reflects a dichotomy in the rationales perceived as underlying the distinction between act and omission in criminal jurisprudence. Courts that define act and omission as per the bodily movement test assume liberty or causation to be the underlying basis for this distinction, while those that do not strictly define act and omission in accordance with this test embrace the creation of risk rationale. Since absence of movement bodily can create risk, some situations that do not involve bodily movement can and should be considered acts rather than omissions.

In light of this alternative theory, there are two distinct models of absence of bodily movement: enabling absence of movement, which relates to situations in which absence of movement merely enables the harm; and creative absence of movement, which relates to situations in which absence of movement actually creates the risk that causes harm. Since, at times, standing still or remaining silent, in and of itself, can create a threat that results in harm, such situations should be considered acts rather than omissions under criminal jurisprudence, thus requiring no identification of a duty to act in order to convict.

